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Nos. 79-118 and 79-5121

In the Supreme Court of the United States

OCTOBER TERM, 1978

ORLANDO DELLI PAOLI, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD WARME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1979. The petitions for a writ of certiorari were filed on July 25, 1979, in No. 79-118 and on July 24, 1979, in No. 79-5121. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to strike the testimony of two government agents because they had discarded their original investigative notes.

2. Whether the district court erred in failing to disclose the personnel files of two police officers who testified at trial and the grand jury testimony of one of those officers concerning unrelated drug charges then pending against petitioner Warme.

3. Whether the district court erred in failing to conduct a hearing *sua sponte* into the effectiveness of petitioner Delli Paoli's counsel (79-118 Pet. only).

4. Whether improper evidence of petitioner Delli Paoli's drug dealings and of his connection with alleged organized crime figures was admitted at trial.

5. Whether the district court erred in failing to order the government to disclose whether a person

[1] "Pet. App." refers to the appendix to the petition in No. 79-118.

who did not testify at trial was a government informant, and in failing to charge the jury on the defense of entrapment (79-5121 Pet. only).

6. Whether the proof at trial showed multiple conspiracies rather than the single conspiracy charged in the indictment (79-118 Pet. only).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to distribute cocaine and heroin, in violation of 21 U.S.C. 846. In addition, petitioner Warme was convicted on three substantive counts of distribution, in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A).[2] Warme was sentenced to a total term of seven years' imprisonment to be followed by a ten-year special parole term.[3] Delli Paoli was sentenced to two years' imprisonment and a ten-year special parole term. The court of appeals affirmed (Pet. App. A).

The evidence adduced at trial is recounted in detail in the opinion of the court of appeals (Pet. App. 2a-9a). In sum, it showed that in early 1978 petitioners and their co-defendants conspired to sell

[2] The jury also convicted co-defendant Victor Isaza and acquitted co-defendant Diane Warme. Petitioners' other co-defendants, Wayne Petrucha and Robert Bolella, pleaded guilty prior to trial (Pet. App. 3a n.1).

[3] Warme's sentence was to run consecutively to a three-year term of imprisonment imposed following his conviction in an unrelated case. See *United States* v. *Warme*, 572 F.2d 57 (2d Cir.), cert. denied, 435 U.S. 1011 (1978)).

heroin and cocaine. During the first three months of 1978, petitioner Warme, the "mastermind" of the conspiracy (Pet. App. 3a), had a number of meetings and telephone conversations with undercover police officer Steven Caracappa relating to drug deals arranged by Warme. On February 25, 1978, Warme and a codefendant provided for Caracappa to purchase an ounce of cocaine. Thereafter, in March 1978, Caracappa purchased through Warme a total of ten ounces of cocaine for $13,000. Later that month, Warme also arranged for Caracappa and another undercover officer, William Petraglia, to buy one-half pound of heroin for $35,000 through petitioner Delli Paoli. On March 27, 1978, the officers gave petitioners $20,000 in "front" money; that afternoon, Delli Paoli claimed that "a friend" had absconded with the money. Petitioners promised, however, to pay the officers back with drugs, and Warme subsequently furnished them with substantial quantities of cocaine.

ARGUMENT

1. Petitioners contend (79-118 Pet. 41-48; 79-5121 Pet. 52-61) that the district court erred in refusing to strike the testimony of undercover officer Caracappa and Drug Enforcement Administration Agent John Mullen,[4] because the officers' original investigative notes had been destroyed in accordance with then-routine agency practice. Caracappa and Mullen discarded their original notes after the information they contained was incorporated into final typewritten reports, which were turned over to the defense at trial (Pet. App. 13a-14a).

This procedure did not violate petitioners' rights, nor did it require that the testimony of the government agents be stricken. This Court has declined to review similar claims in several previous cases,[5] and there is no reason for a different result here.[6]

We recognize that the courts of appeal have taken divergent views regarding the government's obligation to preserve and produce an agent's rough notes. Compare, *e.g.*, *United States* v. *Harris*, 543 F.2d 1247, 1249-1253 (9th Cir. 1976), and *United States* v. *Harrison*, 524 F.2d 421, 423-434 (D.C. Cir. 1975), with *United States* v. *Martin*, 565 F.2d 362, 363 (5th Cir. 1978), *United States* v. *Mase*, 556 F.2d 671, 676

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[4] Agent Mullen's principal involvement in this case was to take surveillance photographs that were admitted into evidence (Tr. 1501-1513). Petitioner Warme also observes in passing (79-5121 Pet. 55) that two other surveillance agents destroyed their rough notes. Our discussion focusing upon Caracappa and Mullen applies equally to the destruction of the notes of the other officers, whose testimony was less significant.

[5] See, *e.g.*, *Shovea* v. *United States*, cert. denied, No. 78-780 (Feb. 21, 1979); *Vella* v. *United States*, cert. denied, 434 U.S. 1074 (1978); *Stebbins* v. *United States*, cert. denied, 434 U.S. 938 (1977); *Harris* v. *United States*, cert. denied, 434 U.S. 986 (1977); *Mehta* v. *United States*, cert. denied, 434 U.S. 965 (1977); *Chew* v. *United States*, cert. denied, 430 U.S. 918 (1977).

[6] We note, moreover, that this issue is of little continuing significance since the government agencies most affected by the issue (including the FBI, the IRS, and the DEA) have recently revised their internal procedures to require the retention of the rough interview notes of their agents.

(2d Cir. 1977), cert. denied, 435 U.S. 916 (1978), and *United States* v. *McCallie*, 554 F.2d 770, 773 (6th Cir. 1977). However, those decisions that require preservation have considered the question only with respect to contemporaneous notes of an interrogation or other formal statement. The rationale for requiring preservation under those circumstances is that such notes are intended to reflect the declarations of the accused or of a witness. *United States* v. *Harrison*, *supra*, 524 F.2d at 427-428, 432. However, other types of rough investigative notes are not designed to record events of the investigation with the precision or detail appropriate to taking a witness' statements.

The materials at issue here were not interview notes. Caracappa's notes concerned his undercover investigative activities, including his conversations with petitioners that occurred during the course of the conspiracy. Mullen's notes concerned his surveillance duties in connection with the investigation (79-118 Pet. 43, 44). In these circumstances, the officers' notes were not of a nature that their retention was required in order to afford petitioners a fair trial. See *United States* v. *Lane*, 574 F.2d 1019, 1022 (10th Cir.), cert. denied, 439 U.S. 867 (1978).[7]

[7] *United States* v. *Bufalino*, 576 F.2d 446 (2d Cir.), cert. denied, 439 U.S. 928 (1978), upon which petitioners rely (78-118 Pet. 41-42; 79-5121 Pet. 52-53), is not to the contrary. In *Bufalino*, agents destroyed actual "back-up" recordings of a defendant's conversations that were not identical to the recordings furnished to the defense and introduced at trial. 576 F.2d at 449. While the court of appeals affirmed the convictions, it criticized the practice of destroying possible "Rule 16 or Jencks Act" material, noting that the recordings in issue "might possibly have shed some light" on the gaps and inaudible passages contained in the recordings put into evidence. *Ibid.* But in that case, in contrast to the situation here, there was little question that the discarded recordings were discoverable under Fed. R. Crim. P. 16 since they contained statements of the defendant. In any event, as the court of appeals observed (Pet. App. 14a-15a), the destruction of the notes in this case preceded the decision in *Bufalino*.

Moreover, there is no reason to believe that the rough notes would have been of assistance to the defense. Petitioners' unsupported claim of prejudice is undermined by the agents' uncontradicted testimony that the information contained in their original notes was accurately reproduced in the final reports that petitioners did receive. In addition, petitioners' guilt was demonstrated by overwhelming evidence derived largely from electronic and photographic surveillance. Even those courts that require preservation of rough interview notes have refused to reverse where "no substantial rights of the [defendants] have been affected by the destruction of the rough notes." *United States* v. *Harris*, *supra*, 543 F.2d at 1253. See *United States* v. *Harrison*, *supra*, 524 F.2d at 435.[8]

[8] Petitioners do not cite, nor are we aware of, any case in which the good-faith destruction of rough notes in accordance with standard agency practice, as occurred here, has led to the reversal of a conviction. See, *e.g.*, *United States* v. *Vella*, 562 F.2d 275, 276 (3d Cir. 1977), cert. denied, 434 U.S. 1074 (1978); *United States* v. *Robinson*, 546 F.2d 309, 312 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977).

2. Petitioners contend (79-118 Pet. 60-67; 79-5121 Pet. 68-77) that the district court's failure to grant them access to possible impeachment material relating to undercover agents Caracappa and Petraglia denied them a fair trial.[9] This claim is without merit.

During trial, petitioner Warme subpoenaed the personnel files of officers Caracappa and Petraglia. After examining these documents *in camera*, the district court quashed the subpoena, stating that the records contained "nothing remotely resembling 3500 material" and "only * * * some possible impeachment matter * * * appear[ing] * * * in [an officer's] application to the Police Department," which, the court concluded, "is privileged on at least two grounds and is inadmissible on at least two grounds" (Tr. 84-85). Shortly thereafter, Warme sought the disclosure both of alleged "3500 material," including Caracappa's investigative reports, and of Caracappa's grand jury testimony concerning an unrelated indictment for amphetamine dealings then pending against Warme. The district court also inspected these documents *in camera* and thereafter refused to disclose the "five or six pages" of grand jury testimony because it was "restricted to the amphetamines and [included] no mention of cocaine whatever" (Tr. 86). The district court did, however, direct the government to treat all of Caracappa's reports as "3500 material," including those dealing solely with the amphetamine allegations, except for two earlier reports

[9] Delli Paoli did not raise this point in the court of appeals.

that, the court determined, would not have "any relevance" to Caracappa's trial testimony (Tr. 86-88). Following their conviction, petitioners' motion for a new trial and for disclosure of the withheld documents was denied (79-5121 Pet. 70).

In the circumstances of this case, the failure of the court to disclose the documents in issue did not deny petitioners a fair trial. The district court conducted a careful review of the requested documents as required by 18 U.S.C. 3500(c), and petitioners allege no facts tending to contradict the district court's finding that the only possible impeachment material contained in the undercover officers' personnel files relately solely to a "privileged and inadmissible" matter disclosed in an officer's employment application. Moreover, extensive Jencks Act material was furnished to petitioners for use in cross-examination of the undercover officers. With respect to the grand jury material, Caracappa did not testify at trial about Warme's amphetamine dealings and hence his grand jury testimony concerning those dealings was not required to be disclosed (see 18 U.S.C. 3500(b)); at the least, petitioners have not demonstrated that the district court abused its discretion in failing to disclose that material. See *United States* v. *Augenblick*, 393 U.S. 348, 355 (1969); *United States* v. *Warme*, *supra*, 572 F.2d at 62 n.6.[10]

[10] Petitioners rely on *United States* v. *Moten*, 582 F.2d 654 (2d Cir. 1978), to support their claim that they were at least entitled to post-trial discovery of the material that had been reviewed *in camera* by the district court. That case, however,

3. During trial Delli Paoli informed the court that a dispute over fees had developed with counsel, and that counsel did not want to represent him. Counsel, however, did not ask to be relieved (79-118 Pet. 54; Tr. 2054-2055). Petitioner Delli Paoli contends (79-118 Pet. 54-60) that the district court erred in failing *sua sponte* to conduct an evidentiary hearing into whether this alleged "rift" with trial counsel over the payment of legal fees denied him the effective assistance of counsel.

This incident provided no basis for an evidentiary hearing. Neither Delli Paoli nor his counsel requested the court to hold a hearing. Furthermore, Delli

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bears no resemblance to this one. During the trial in *Moten*, possible juror misconduct was brought to the attention of the court, which then conducted *in camera* examinations of the juror and another party who might have been involved in the misconduct. These persons subsequently testified before the grand jury in its investigation of the alleged juror misconduct. In these circumstances the court of appeals in *Moten* held that the defendant was entitled to disclosure of that grand jury testimony as well as the *in camera* proceedings on the grounds that *in camera* proceedings are disfavored in criminal trials, the government had not demonstrated any need for continued secrecy, and the information was "no doubt" relevant to the defendant's inquiry into whether juror misconduct had affected his right to an impartial jury. 582 F.2d at 660-664. Here, on the other hand, the district court's *in camera* scrutiny of the materials in issue is not even remotely analogous to the secret examination conducted in *Moten* and, as noted above, the non-disclosure of these materials could hardly have affected petitioners' right to a fair trial. Moreover, the Second Circuit itself was unpersuaded by petitioners' argument below that this case created an intra-circuit conflict with *Moten*, finding that their contention in this regard "do[es] not merit discussion" (Pet. App. 16a).

Paoli did not make any allegations to the district court that his attorney had not provided, or would not continue to provide, effective representation. Even now, Delli Paoli takes issue with but one decision by counsel over the course of a three-week trial.[11] With this single exception, Delli Paoli was evidently represented in a manner satisfactory to him, and we have found nothing in the record suggesting that counsel's representation was less than reasonably effective. Therefore, even if the trial court erred in not conducting a hearing into counsel's effectiveness, the error was harmless.[12]

4. Petitioners' remaining contentions were fully addressed and properly rejected by the court of appeals (Pet. App. 9a-16a), and we will discuss them only briefly.

a. Petitioners assert (79-118 Pet. 19-40; 79-5121 Pet. 38-51) that two statements were improperly admitted into evidence. First, they contend that the court erred in allowing testimony regarding an out-of-court statement by Warme implicating Delli Paoli in a $50,000 drug deal in Miami. Second, they

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[11] Delli Paoli criticizes only counsel's tactical decision to introduce into evidence an address book that had been seized from Delli Paoli at the time of his arrest.

[12] *Cross* v. *United States*, 392 F.2d 360 (8th Cir. 1968), upon which Delli Paoli relies (79-118 Pet. 55), is clearly distinguishable. In that case defense counsel had told the trial court that he had intentionally been derelict in his performance and had not "attempt[ed] to develop the case," citing specific examples of the things he should have done but failed to do. 392 F.2d at 365-367.

object to a witness' reference to a statement by Warme that Delli Paoli was "hooked up with 'Fat' Tony Salerno and the 'Pleasant Avenue people.'" Petitioners assert that this testimony introduced the "spectre of organized crime" at trial.

As the court of appeals correctly held (Pet. App. 12a), Warme's statement about Delli Paoli's involvement in a "$50,000 heroin deal" was admissible "to prove capability and intent, [and] also as a classic statement in furtherance of the conspiracy." See Fed. R. Evid. 404(b), 801(d)(2)(E); *United States* v. *Knuckles*, 581 F.2d 305, 313-314 (2d Cir.), cert. denied, 439 U.S. 986 (1978); *United States* v. *Carlson*, 547 F.2d 1346, 1354 & n.5 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977). The evidence was undoubtedly damaging, as evidence of a crime invariably is, but it was not unfair or improper and therefore not "prejudicial." Moreover, the court gave the jury cautionary instructions on the proper use of that evidence (Tr. 306-308, 312-313). The court of appeals also correctly held (Pet. App. 13a) that the "passing reference" to Delli Paoli's alleged connection with "'Fat' Tony Salerno and the Pleasant Avenue People" could not have linked petitioners to organized crime, and in any event the district court expressly instructed the jury to disregard that testimony (Tr. 306).

b. Warme contends (79-5121 Pet. 24-38, 62-67) that the district court erred in declining to charge the jury on entrapment and refusing to require the government to disclose whether a person

identified as "Lorraine," who had introduced the undercover officer to Warme but did not testify at trial, was a government informant. However, as the court of appeals observed (Pet. App. 15a-16a), these rulings were correct since Warme failed to make any showing that "Lorraine's" relationship with the government was relevant to his defense and "never introduced any evidence tending to support an entrapment defense."

c. Finally, the court of appeals correctly rejected (Pet. App. 9a-12a) Delli Paoli's claim (79-118 Pet. 48-54) that there was a variance between the proof at trial and the single conspiracy charged in the indictment. As the court concluded, the proof showed that Warme headed an ongoing narcotics business in which he arranged sales of large amounts of drugs through his co-defendants, and that "[e]ach of the defendants knew of Warme's general plan and of the role each played in the attempt to bring that plan to fruition" (Pet. App. 10a). Thus, the court held that "there was sufficient evidence to permit the jury to find the single conspiracy charged in the indictment" (*ibid.*). See *United States* v. *Moten*, 564 F.2d 620, 625 (2d Cir.), cert. denied, 434 U.S. 959 (1977); *United States* v. *Ricco*, 549 F.2d 264, 267-268 (2d Cir.), cert. denied, 431 U.S. 905 (1977).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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